

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

NEW OCEAN EMPIRE SEAFOOD RESTAURANT, INC.¹

Employer

and

Case No. 29-RC-9779

LOCAL 318 RESTAURANT WORKERS UNION

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Amy Krieger, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that New Ocean Empire Seafood Restaurant, Inc., herein called the Employer or New Ocean Empire, is a domestic corporation, whose principal office and place of business is located at 5418-22 8th Avenue, Brooklyn, New York, where it is engaged in the restaurant business. During the past year, which period is representative of its operations generally, the Employer, in the course and conduct of

¹ The Employer's name appears as amended at the hearing.

its business operations, purchased beverages, food and supplies directly from firms located outside the State of New York in the amount of \$2,000.

Prior to the hearing, a subpoena was served on the Employer, requiring the production of its financial records for the purpose, *inter alia*, of establishing whether the Employer meets the Board's discretionary jurisdictional standards. Under the standard applicable to retail enterprises, including restaurants, the Board may decline to assert jurisdiction over enterprises whose gross annual volume of business is under \$500,000. *See, e.g., City Line Open Hearth, Inc.*, 141 NLRB 799, 801 (1963). At the hearing, New Ocean Empire indicated that it was served with the subpoena, but did not intend to produce any of the documents requested therein.

In *Tropicana Products, Inc.*, 122 NLRB 121 (1958), the Board "determined that it best effectuates the policies of the Act, and promotes the prompt handling of cases, to assert jurisdiction in any case in which an employer has refused, upon reasonable request by Board agents, to provide the Board or its agents with information relevant to the Board's jurisdictional determinations, where the record developed at a hearing, duly noticed, scheduled and held, demonstrates the Board's statutory jurisdiction, irrespective of whether the record demonstrates that the Employer's operations satisfy the Board's jurisdictional standards." *Tropicana*, 141 NLRB at 123. The record in the instant case, by way of the parties' stipulation, establishes that the Board has statutory jurisdiction, inasmuch as the Employer has more than a *de minimus* impact on commerce. Accordingly, and in light of the Employer's failure to comply with the subpoena, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. Based on the stipulation of the parties, and the record as a whole, I find that Local 318 Restaurant Workers Union, herein called the Petitioner or the Union, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes,

wages, rates of pay, hours of employment, or conditions of work. The Union is a labor organization within the meaning of Section 2(5) of the Act.

The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The parties stipulated, and I find, that the following unit is appropriate for the purposes of collective bargaining:

All full-time and regular part-time dining room employees, including waiters, dim sum carters and bus staff employees, employed by the Employer at its 5418-22 8th Avenue, Brooklyn, New York, facility, but excluding all other employees, cashiers, take-out counter employees, meat cutters, guards and supervisors as defined in the Act

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to

vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by Local 318 Restaurant Workers Union or no labor organization.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before January 15, 2002. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by January 22, 2002.

Dated at Brooklyn, New York, January 8, 2002.

/s/ Alvin P. Blyer
Alvin P. Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
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240-0167-6700